

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
EX REL. WAYNE STENEHJEM,
ATTORNEY GENERAL,

Civil No. 08-C-518

Petitioner,

-VS-

**ORDER OF APPROVAL OF
SECOND ASSURANCE OF
VOLUNTARY COMPLIANCE**

SMARTREPLY, INC.,
dba WWW.SMARTREPLY.COM,
dba VOICEBLAST,

Respondent.

CPAT 080010.001

Pursuant to the authority of this Court provided in N.D.C.C. § 51-15-06.1,

IT IS HEREBY ORDERED that the attached Assurance of Voluntary Compliance
is approved as an assurance of discontinuance as specified in N.D.C.C. § 51-15-06.1.

The Clerk of Court shall receive and file this Assurance of Voluntary Compliance.

Dated this 18 day of September, 2008.

BY THE COURT:

1st Gail Hogarty
Judge of the District Court

RECEIVED & FILED

SEP 18 2008

Clk. of Crt. Burleigh Co.

084515

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Respondent.

CPAT 080010.001 v2

.....
To each person or entity identified below, hereinafter "Respondent":

SMARTREPLY, INC.
dba WWW.SMARTREPLY.COM
dba VOICEBLAST
114 Pacifica, Ste. 290
Irvine, CA 92618
949-340-0700 (p)
949-340-0777 (f)

and

6410 Oak Canyon, Ste. 100
Irvine, CA 92616

and

c/o William E. Raney, Esq.
Copilevitz & Canter, LLC
310 W. 20th Street, Ste. 300
Kansas City, MO 64108

WHEREAS Wayne Stenehjem, Attorney General of the State of North Dakota
(hereinafter "the Attorney General"), acts in the public interest pursuant to North Dakota

Century Code ("N.D.C.C.") chs. 51-15 (commonly referred to as the "Consumer Fraud Law") and 51-28 (commonly referred to as the "Do Not Call Law"); and

WHEREAS the Attorney General has determined that in the public interest an investigation should be conducted into the activities of Respondent to ascertain whether violations of chs. 51-15 and 51-28 have occurred; and

WHEREAS N.D.C.C. ch. 51-28 prohibits certain calls using automatic dialing-announcing devices to telephone subscribers in North Dakota; and

WHEREAS violations of N.D.C.C. ch. 51-28 are deemed violations of N.D.C.C. ch. 51-15; and

WHEREAS the Attorney General has received a consumer complaint and/or other information alleging Respondent engaged in placing telephone calls in violation of North Dakota law; and

WHEREAS as a result of this investigation the Attorney General alleges, among other things, Respondent has violated N.D.C.C. chs. 51-15 and 51-28; and

WHEREAS the parties desire to settle this matter without litigation and without an admission of liability;

NOW THEREFORE it is hereby agreed:

1. This Assurance of Voluntary Compliance shall constitute the statutory assurance of discontinuance as provided in N.D.C.C. § 51-15-06.1. Respondent acknowledges *in personam* jurisdiction in North Dakota and agrees the forum of any action in connection with this agreement shall be in the state courts of North Dakota. By entering into this Assurance of Voluntary Compliance, Respondent does not admit to any violation of North Dakota law. Nothing in this Assurance of Voluntary Compliance

is, or may be represented as, an approval or endorsement of Respondent or its business practices, nor a grant of any affirmative right to Respondent. Nothing in this Assurance of Voluntary Compliance is intended to waive any rights or private remedies available to consumers. *See also* N.D.C.C. § 51-15-09.

2. Respondent, including its directors, officers, partners, associates, principals, employees, agents, contractors, servants and all other persons in active concert or participation with them, directly or indirectly, voluntarily agrees to be and is permanently enjoined from making telephone calls in violation of North Dakota law.

3. North Dakota Century Code § 51-28-02 says:

Use of prerecorded or synthesized voice messages. A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

4. Respondent hereby acknowledges that a past retail purchase from Respondent, or from a party for whom Respondent is acting, does not establish a "current business relationship" under N.D.C.C. § 51-28-02.

5. If Respondent, or a party for whom Respondent is acting, wishes to obtain a North Dakota subscriber's telephone number from the subscriber for purposes of using an automatic dialing-announcing device to connect to the subscriber's telephone line, Respondent must establish that the subscriber has knowingly requested, consented to, permitted or authorized receipt of such a message, or that the message is otherwise permitted under N.D.C.C. § 51-28-02. By way of example, not of limitation, if Respondent, or a party for whom Respondent is acting, receives a subscriber's

telephone number in the subscriber's response to the question: "Would you like to receive a prerecorded [and/or synthesized] voice message at your home phone number to keep you informed of our sales and promotions?" it would be evidence that the subscriber has knowingly requested, consented to, permitted or authorized receipt of such a message.

Respondent acknowledges that in the event of an allegation of a violation of N.D.C.C. § 51-28-02, Respondent will have the burden of production and proof in the event it wishes to establish that a particular subscriber has knowingly requested, consented to, permitted or authorized receipt of a message by means of an automatic dialing-announcing device. The mere fact that Respondent, or a party for whom Respondent is acting, might have a policy or procedure which calls for a subscriber to be asked the question: "Would you like to receive a prerecorded [and/or synthesized] voice message at your home phone number to keep you informed of our sales and promotions?" is not, in and of itself, proof that any particular subscriber was, in fact, asked that question and provided the telephone number in response to that question.

6. Respondent agrees it will comply with this Assurance of Voluntary Compliance and further acknowledges and agrees any violations of this Assurance of Voluntary Compliance shall be punishable as contempt of court pursuant to N.D.C.C. ch. 27-10 and Respondent further may be subject to all other civil penalties and sanctions provided by law, including attorney fees and costs. Respondent agrees to pay a civil penalty of at least \$1,000 per violation for any violations of this Assurance of Voluntary Compliance, or any future violations of N.D.C.C. ch. 51-28; provided, however, the Attorney General shall not be precluded from seeking more than \$1,000

per violation, or any other remedies provided in N.D.C.C. chs. 51-15 or 51-28, or other North Dakota law. Respondent agrees that in the event of any violation of this Assurance of Voluntary Compliance, the Attorney General may pursue all claims and complaints against Respondent as well as retain any payments already made.

If Respondent is adjudged in contempt of court for violations of this Assurance of Voluntary Compliance, adjudged in violation of this Assurance of Voluntary Compliance or adjudged in violation of N.D.C.C. ch. 51-28, Respondent shall also be responsible for payment to the Attorney General for reasonable investigation costs, expenses and attorney fees.

7. Upon execution of this Assurance of Voluntary Compliance by Respondent, Respondent shall make a payment to the Attorney General in the sum of **\$5,000** in lieu of civil penalties, investigation costs and attorney fees. Payment shall be a check or money order made payable to **Office of Attorney General – North Dakota**, and delivered to:

Consumer Protection
& Antitrust Division
Office of Attorney General
4205 State Street
Bismarck, ND 58503-0623
Attn: JPTThomas

Any payment not timely received is deemed delinquent and a material violation of this Assurance of Voluntary Compliance.

8. In consideration for Respondent's payment in lieu of civil penalties and execution of this Assurance of Voluntary Compliance, and contingent upon full compliance with this Assurance of Voluntary Compliance, the State of North Dakota through the Attorney General hereby releases Respondent from any and all of the

Attorney General's Do Not Call Law liability claims, demands, damages, suits, actions, claims for relief and causes of action, whether known or unknown, arising out of the telephone calls at issue and/or any telephone calls made prior to September 2, 2008.

9. In the event of a breach of this Assurance of Voluntary Compliance, the Attorney General may, without further notice to Respondent, make application to a State of North Dakota District Court to have the entire amount still owing under the Assurance of Voluntary Compliance entered as a formal judgment so it may be filed on the judgment roll and docketed pursuant to North Dakota law. See N.D.C.C. §§ 28-20-11, -12 and 28-20-13. Respondent agrees that an Affidavit of Non-Compliance of the Office of Attorney General shall be *prima facie* evidence of each violation of this Assurance of Voluntary Compliance.

10. Respondent represents the signer below is competent and fully authorized to act on behalf of Respondent. Respondent acknowledges it has reviewed this Assurance of Voluntary Compliance with an attorney, understands the implications and obligations imposed by it and has knowingly, freely and willingly entered into this Assurance of Voluntary Compliance rather than contest the matter in court. Respondent further acknowledges and agrees this Assurance of Voluntary Compliance may be approved by and filed with the District Court without any further notice or hearing. Signatures transmitted electronically or via facsimile by Respondent shall be deemed the equivalent of original signatures; this document may be executed in counterparts, with each counterpart deemed an original.

SMARTREPLY, INC.

dba WWW.SMARTREPLY.COM

dba VOICEBLAST

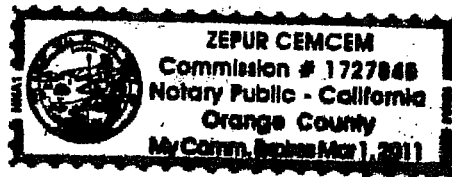
(including all "doing business as" names, formal corporate names, fictitious names of any kind or any variations of the same)

By: Theodo Pearl Burgess

Its: Director of Finance

STATE OF CALIFORNIA)
) ss
COUNTY OF Orange)

Subscribed and sworn to before me this
9th day of September, 2008.



Zepur Cemmum
Notary Public

This Assurance of Voluntary Compliance is hereby received and accepted.

Dated this 16th day of September, 2008.

STATE OF NORTH DAKOTA

Wayne Stenehjem
Attorney General

By: 

James Patrick Thomas
ID No. 06014
Assistant Attorney General
Consumer Protection and
Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
(701) 328-5570

Attorneys for Petitioner